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No. 06-167

IN THE

Supreme Court of the United States

JEANNE WOODFORD, DEWEY WOOTEN, ANTHONY P. KANE, H. WILLIAMS, D.A. DACANAY, AND I.A. NIEHUIS,
Petitioners,

v.

ROMIRICO REMEIDIO,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF THE STATES OF INDIANA, ALABAMA, ALASKA, ARIZONA, COLORADO, DELAWARE, GEORGIA, HAWAII, IDAHO, ILLINOIS, MICHIGAN, MONTANA, NEW HAMPSHIRE, OHIO, OKLAHOMA, OREGON, PENNSYLVANIA, SOUTH CAROLINA, TEXAS, VIRGINIA, WASHINGTON, WEST VIRGINIA, and WYOMING AS *AMICI CURIAE* IN SUPPORT OF THE PETITION

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QUESTION PRESENTED

Can an inmate's First Amendment retaliation claim survive summary judgment when the inmate cannot prove that there was no objectively legitimate penological reason for the government action?

TABLE OF CONTENTS

QUESTION PRESENTED i

TABLE OF AUTHORITIES iii

INTEREST OF *AMICI CURIAE* 1

REASONS FOR GRANTING THE PETITION 1

I. Prison Guards in Many States Face Unpredictable Odds Resisting First Amendment Retaliation Claims While Those in Other States Need Not Fear Having Their Motives Second-Guessed 1

A. A deep circuit conflict demonstrates judicial uncertainty over how to handle prisoners' First Amendment retaliation claims 1

B. The standard for retaliation claims has real-world litigation consequences of a potentially vast scope 4

II. The Rule Applied in the Decision Below Conflicts with *Turner v. Safley* and Fails to Give Proper Deference to Prison Officials 6

CONCLUSION 10

TABLE OF AUTHORITIES

Cases

Adams v. Wainwright, 875 F.2d 1536 (11th Cir. 1989).....2

Amatel v. Reno, 156 F.3d 192 (D.C. Cir. 1998).....8

Armstead v. Clark, 2006 WL 2373241 (7th Cir. 2006).....5

Armstead v. Clark, No. TH 02-40-C-M/F, Docket No. 92, Entry Disssing Pending Motions, (S.D. Ind. Nov. 30, 2004).....5

Babcock v. White, 102 F.3d 267 (7th Cir. 1996).....2, 3, 5

Beard v. Banks, __ U.S. __, 126 S. Ct. 2572 (2006).....7

Byrd v. Moseley, 942 F. Supp. 642 (D.D.C. 1996) 2

Curtis v. Solomon, 2006 WL 1653354 (N.D. Fla. 2006) 2

Dejesus v. Edgar, 1998 WL 171272 (7th Cir. 1998) 3

Garcetti v. Ceballos, __ U.S. __, 126 S. Ct. 1951 (2006).....9

Graham v. Henderson, 89 F.3d 75 (2d Cir. 1996) 2

Hartman v. Moore, __ U.S. __, 126 S. Ct. 1695 (2006) 7, 8

Henderson v. Baird, 29 F.3d 464 (8th Cir. 1994) 2

McClain v. Leisure, 2006 WL 2468545 (7th Cir. 2006) ...5, 6

McDonald v. Hall, 610 F.2d 16 (1st Cir. 1979) 3

Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle, 429 U.S. 274 (1977).....2, 3

Overton v. Bazzetta, 539 U.S. 126 (2003) 8

Peterson v. Shanks, 149 F.3d 1140 (10th Cir. 1998) 3

Pickering v. Bd. of Ed. of Twp. High Sch. Dist. 205, 391 U.S. 563 (1968) 9

Cases (cont'd)

Rauser v. Horn, 241 F.3d 330 (3d Cir. 2001) 2

Rizzo v. Dawson, 778 F.2d 527 (9th Cir. 1985) 1

Smith v. Davis, No. 3:02-CV-0233-PS, Docket No. 145 (N.D. Ind. July 14, 2004) 5

Thaddeus-X v. Blatter, 175 F.3d 378 (6th Cir. 1999) 2, 9

Turner v. Safley, 482 U.S. 78 (1987) 6, 7, 8

Wagner v. Wheeler, 13 F.3d 86 (4th Cir. 1993) 2

Woods v. Smith, 60 F.3d 1161 (5th Cir. 1995) 3

Constitutional Provisions

U.S. Const. amend I ..... *passim*

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Annual Report of the Director, *Judicial Business of the United States Courts*, at 162 (Table C-2A) (2005), *available at* http://www. uscourts.gov/judbus 2005/appendices/c2a.pdf (last visited Aug. 29, 2006) 4

Bureau of Justice Statistics, *Prison and Jail Inmates at Midyear 2004*, at 2 (Table 1) (Apr. 2005), *available at* http://www.ojp.usdoj.gov/bjs/pub/ pdf/pjim04.pdf (last visited Aug. 29, 2006) 1

INTEREST OF *AMICI CURIAE*

Over 91% of all inmates in the United States are in state or local custody. *See* Bureau of Justice Statistics, *Prison and Jail Inmates at Midyear 2004*, at 2 (Table 1) (Apr. 2005), *available at* http://www.ojp.usdoj.gov/bjs/pub/pdf/pjim04.pdf (last visited Aug. 29, 2006). Purely as a matter of opportunity, every negative statement from an inmate to or about a guard may plant the seed for a First Amendment retaliation claim in the event of later disciplinary action against the inmate. At the same time, prisons are dangerous places for prisoners and guards alike, and they can be made safer only by strict enforcement of prison rules. The *amici* states therefore have a compelling interest in ensuring that guards and other prison officials may enforce prison rules when justified by legitimate penological interests without fearing that their motives will ultimately be put on trial.

REASONS FOR GRANTING THE PETITION

I. Prison Guards in Many States Face Unpredictable Odds Resisting First Amendment Retaliation Claims While Those in Other States Need Not Fear Having Their Motives Second-Guessed

A. A deep circuit conflict demonstrates judicial uncertainty over how to handle prisoners' First Amendment retaliation claims

Federal appellate decisions in prisoner-retaliation cases are all over the board with regard to both outcome and reasoning. At one end of the continuum is the Ninth Circuit, which permits a trial over retaliatory motive as long as the prisoner disputes that enforcement of prison rules was undertaken in good faith. *See* Pet. 8; *see also Rizzo v. Dawson*, 778 F.2d 527, 532 (9th Cir. 1985) ("[P]laintiff has alleged that [the prison official's] actions were retaliatory

and were arbitrary and capricious. He has thereby sufficiently alleged that the retaliatory acts were not a reasonable exercise of prison authority and that they did not serve any legitimate correctional goal."). At the other end of the continuum is the Eighth Circuit, which ignores subjective motivations and simply asks whether there is an adequate evidentiary basis for the disciplinary action—essentially an objective search for any legitimate justification. *See Henderson v. Baird*, 29 F.3d 464, 469 (8th Cir. 1994); *see also Byrd v. Moseley*, 942 F. Supp. 642, 645 (D.D.C. 1996) (placing the burden on the plaintiff to show not only that retaliation was a substantial or motivating factor, but also that the retaliatory action did not advance legitimate penological goals).

Other courts apply standards somewhere in the middle. The Second, Third, Fourth, Sixth, Seventh, and Eleventh Circuits consider evidence of actual motive, but use the burden-shifting analysis of *Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274 (1977), to allow prison officials to overcome a showing of improper motive with evidence that the punishment would have been imposed regardless. *See Graham v. Henderson*, 89 F.3d 75, 79-80 (2d Cir. 1996); *Rauser v. Horn*, 241 F.3d 330, 334 (3d Cir. 2001); *Wagner v. Wheeler*, 13 F.3d 86, 90 (4th Cir. 1993); *Thaddeus-X v. Blatter*, 175 F.3d 378, 399 (6th Cir. 1999); *Babcock v. White*, 102 F.3d 267, 275 (7th Cir. 1996); *Adams v. Wainwright*, 875 F.2d 1536, 1537 (11th Cir. 1989) (declining "to adopt the 'but for' standard" because it places a greater burden of proof on the prisoner); *see also Curtis v. Solomon*, 2006 WL 1653354, at *18 (N.D. Fla. 2006) (applying *Mt. Healthy* and stating that "it is beneficial to maintain uniformity of analysis of First Amendment retaliation claims").

Meanwhile, the First, Fifth, and Tenth Circuits definitively tax the prisoner to establish but-for causation. *See*

McDonald v. Hall, 610 F.2d 16, 18-19 (1st Cir. 1979); *Woods v. Smith*, 60 F.3d 1161, 1166 (5th Cir. 1995); *Peterson v. Shanks*, 149 F.3d 1140, 1144 (10th Cir. 1998).

As the Petition outlines with respect to the Ninth Circuit, *see* Pet. 8-9, even cases within circuits demonstrate confusion and inconsistency. For example, while the Seventh Circuit's *Babcock* decision adopts the *Mt. Healthy* burden-shifting standard, requiring the government to disprove but-for causation, the court at times uses *Babcock* to require prisoners to prove both the existence of a retaliatory motive and its but-for relationship to the alleged retaliatory action. *See, e.g.*, *Dejesus v. Edgar*, 1998 WL 171272, at *2 (7th Cir. 1998) ("To state a claim of retaliatory treatment for the exercise of a constitutionally protected right, [plaintiff] must allege a chronology of events from which retaliation may be inferred. Moreover, [plaintiff] must show that he would [not] have been placed in protective custody were it not for the fact that he filed lawsuits against prison officials and served as a prison litigator.").

These standards are fundamentally incompatible and lead to different litigation burdens, settlement incentives, and judicial results for prison officials of different states. Given the same set of facts, a prison guard in the Second Circuit will likely have more incentive to settle than one in the Eighth Circuit, but less than one in the Ninth Circuit, where nearly any prisoner-retaliation claim with some modicum of evidentiary support may be tried. As important, these different standards may translate into different levels of vigilance when it comes to enforcing prison rules. Prison guards in several pro-prisoner circuits, particularly the Ninth Circuit but also the Second, Third, Fourth, Sixth, Seventh, and Eleventh Circuits, may be more easily deterred from disciplining inmates known to have filed grievances because they are sitting ducks for burdensome and unpredictable

retaliation claims. Meanwhile, guards in the Eighth Circuit may be confident that their legitimate enforcement judgments will survive scrutiny even if an offending inmate has recently filed a grievance.

The lower courts plainly have not reached and will not reach a consensus on a proper, consistent standard for First Amendment retaliation claims. With all eleven regional circuits that govern states having attempted to divine the proper standard, there is little point in allowing the issue to percolate any further. The Court should step in now and settle this deep conflict.

B. The standard for retaliation claims has real-world litigation consequences of a potentially vast scope

It is no secret that inmates generate an enormous volume of civil-rights litigation: For the year ending September 30, 2005, 16,005 prisoner-civil-rights complaints were filed in federal court, a 3.4% increase from 2004. *See* Annual Report of the Director, *Judicial Business of the United States Courts*, at 162 (Table C-2A) (2005), *available at* http://www.uscourts.gov/judbus2005/appendices/c2a.pdf (last visited Aug. 29, 2006). Neither the federal government nor many states systematically collect data concerning First Amendment retaliation claims, but it nonetheless appears that a significant percentage of prisoner cases include such claims. For example, in 2005, California state officials were sued in 61 new federal prisoner-civil-rights cases alleging retaliation, and in the first six months of 2006, California officials have already been sued in 36 new retaliation cases. Even a small state such as Indiana has seen over 15 new retaliation cases filed by prisoners in state and federal court since 2005 and nearly 40 since 2003.

The conflicting and unpredictable standards that swirl about the country have a real impact on how states litigate

the rafts of retaliation claims they face each year, as a couple of cases illustrate. In *Smith v. Davis*, No. 3:02-CV-0233-PS, Docket No. 145 (N.D. Ind. July 14, 2004), where a prisoner who filed a grievance was confined in administrative segregation after he physically assaulted another inmate, the court upheld a jury's award of punitive damages based on the prisoner's testimony that a guard said "he would get him for filing the grievance." *Id.* at 7. Thus, an allegation of a single hot-headed statement from one guard was enough to defeat an undisputed compelling penological justification for discipline. Prison officials likely would have prevailed under the standards imposed by the First, Fifth, Eighth, and Tenth Circuits. Within the Seventh Circuit, however, the punitive-damages verdict may encourage prisoner-retaliation claims even where there is undisputed prisoner misconduct.

Similarly, in *Armstead v. Clark*, No. TH 02-40-C-M/F, Docket No. 92, Entry Discussing Pending Motions, (S.D. Ind. Nov. 30, 2004), an inmate threatened a guard in a grievance and the same day was formally reported for doing so. The court said that the prisoner could not prevail "unless he establishes that the challenged action would not have occurred 'but for' the constitutionally protected conduct," yet permitted the case to proceed to trial simply because the prisoner disputed "the defendant's reason for writing the conduct report." *See id.* at ¶2d. After a bench trial, the court entered judgment for the guard. *See Armstead v. Clark*, 2006 WL 2373241, at *3 (7th Cir. 2006) (affirming). Summary judgment, however, was defeated not by any serious evidence of retaliation, but by a clever prisoner's use of the grievance procedure to simultaneously threaten a guard and lay the groundwork for a plausible inference of retaliatory motive when he was punished for the threat. Moreover, the court was so uncertain how to apply the doctrine that it did not even hold the prisoner to the but-for standard that the court thought should apply (but which appears to have been contrary to *Babcock* in any event). *But see McClain v.*

Leisure, 2006 WL 2468545, at *6-7 (7th Cir. 2006) (*granting* summary judgment to a prison guard who issued a conduct report against a prisoner for making false statements in a grievance because there was no evidence to support the contention of retaliatory motive).

II. The Rule Applied in the Decision Below Conflicts with *Turner v. Safley* and Fails to Give Proper Deference to Prison Officials

In *Turner v. Safley*, 482 U.S. 78 (1987), the Court, upholding a rule restricting inmate correspondence, announced a legal standard for prisoners' constitutional claims "that is responsive both to the 'policy of judicial restraint regarding prisoner complaints and [to] the need to protect constitutional rights.'" *Id.* at 85. Under *Turner*, a prison rule will be upheld if it is "reasonably related to legitimate penological interests." *Id.* at 89. This standard is significant here for two reasons.

1. First, under the *Turner* standard, it makes no difference whether the government's legitimate interests are mere pretexts and the rule at issue results from some retaliatory motive on the part of prison officials. *See id.* at 89. Under the standard articulated by the decision below, however, if an inmate so much as alleges that the rule or regulation was applied to him in retaliation for exercise of his First Amendment rights, the inmate is entitled to a jury trial concerning the validity of the action. *See* Pet. 6.

In other words, absent a retaliation claim, courts analyze prison restrictions impinging constitutional rights only for bare legitimacy. However, in the Ninth Circuit's view, if an inmate alleges that otherwise legitimate enforcement of a legitimate rule was undertaken in retaliation against his exercise of First Amendment rights, courts must then examine the officials' motives. Neither the Ninth Circuit, nor

any other lower court, however, has explained why prisoners' First Amendment retaliation claims are entitled to more searching review than prisoners' other First Amendment claims. *See Beard v. Banks*, __ U.S. __, 126 S. Ct. 2572, 2578 (2006) (applying *Turner* to a prisoner's First Amendment challenge to a prison rule).

Prison rules help bring order and safety to a chaotic and insecure environment. Prison guards must be able to enforce these rules so long as there is an objectively reasonable basis for doing so. Relationships between prisoners and guards are often contentious, but general bad feelings are part of the nature of prison life and should be irrelevant in determining whether a prisoner was subjected to unlawful First Amendment retaliation. Subjective inquiries into motivation are unpredictable, and prison guards cannot adequately prepare airtight defenses, no matter how pure their personal motivations. Prison guards usually can, however, prove an objectively legitimate basis for enforcing a prison rule—if one exists—and such evidence ought to be enough to defeat a retaliation claim in this particular setting. *Cf. Hartman v. Moore*, __ U.S. __, 126 S. Ct. 1695, 1704 (2006) (holding that probable cause defeats retaliatory prosecution claims in part because there is a "distinct body of highly valuable circumstantial evidence available and apt to prove or disprove retaliatory causation, namely evidence showing whether there was or was not probable cause to bring the criminal charge").

2. Second, the Ninth Circuit's rule also fails to give due deference to the judgment of prison officials. In *Turner*, the Court recognized that "'courts are ill equipped to deal with the increasingly urgent problems of prison administration and reform'" and "[r]unning a prison is an inordinately difficult undertaking that requires expertise, planning, and commitment of resources, all of which are peculiarly within the province of the legislative and executive branches of

government." *Turner*, 482 U.S. at 84-85. The Court "accord[s] substantial deference to the professional judgment of prison administrators, who bear a significant responsibility for defining the legitimate goals of a corrections system and for determining the most appropriate means to accomplish them." *Overton v. Bazzetta*, 539 U.S. 126, 132 (2003); *cf. Hartman*, 126 S. Ct. at 1706 (proceeding from the "presumption that a prosecutor has legitimate grounds for the action he takes").

The Ninth Circuit's standard contravenes these principles and enables inmates to use speech to immunize themselves from the enforcement of prison rules. If an inmate can simply file a grievance, violate the rules, and then assert a triable federal claim that resulting discipline is illegal retaliation, grievances may well create bubbles of protection for prisoners clever enough to use grievances as weapons.

Furthermore, only in prisons, government employment, and a few other contexts can ordinary, everyday conversations prompt government action threatening First Amendment rights. *See Amatel v. Reno*, 156 F.3d 192, 195-96 (D.C. Cir. 1998). In these contexts, a class of subordinate individuals must constantly interact with a class of government supervisors whose actions may form the predicate for constitutional claims. Some mode of deference to government officials is even more necessary in these contexts because every communication may become, or at least plant the seeds for, a federal case. *See id.* (observing that prisons, public schools, the military, and government workplaces demand "regulation more intrusive than what may lawfully apply to the general public").

The mode of deference in government employment cases relates to the content of employee speech. The government has an interest in "promoting the efficiency of the public services it performs through its employees," so

government employee speech is protected only as to "matter[s] of public concern." *Pickering v. Bd. of Ed. of Twp. High Sch. Dist. 205*, 391 U.S. 563, 568 (1968). If the speech relates in any way to official duties, courts defer to the legitimate judgments of government employers. *See Garcetti v. Ceballos*, __ U.S. __, 126 S. Ct. 1951, 1960 (2006).

The speech of prison inmates, however, is not similarly divisible into categories of protected and unprotected speech. As with ordinary citizens who are not government employees, there is no requirement that inmate speech touch a matter of public concern to be protected by the First Amendment. *See Thaddeus-X*, 175 F.3d at 391 ("No circuit has held that the . . . public concern limitation applies to prisoners' speech."). Under standards such as that applied in the decision below, therefore, nearly all speech or expressive conduct by an inmate can become the basis for a First Amendment retaliation claim.

To check that possibility, the same deference that courts ordinarily pay to prison officials in response to prisoners' constitutional claims should impose a brake on retaliation claims as well. Rejecting prisoners' retaliation claims where a legitimate penological interest supports the government action would prevent prisoners from using every conversation to set up prison guards and other officials for retaliation claims. It would also eliminate the apparent inferiority of government employees relative to prisoners as First Amendment retaliation plaintiffs. Regardless, the Court should grant the petition to examine this issue.

CONCLUSION

The petition for a writ of certiorari should be granted.

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